Office-Supreme Court, U.S.
FILED
AUG 19 1964
JOHN F. DAVIS, CLERK

No. 215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PAUL L. TEMPLE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

ARGUMENT.

Government Counsel suggest (Gov. Brf. 8) that Petitioner's counsel defended him as well as could be expected since the facts in the case were favorable to the Govern-

ment. This is all the more reason for Defense Counsel to keep out every scrap of inadmissible evidence and to yield ground on nothing.

It certainly reflects on the competence of Petitioner's attorney to permit the testimony of Mr. W. J. Hicks, Night Manager of the Edgewater Beach Hotel, that Temple gave him a check to replace one returned for insufficient funds to go unchallenged. *His attorney's* cross examination revealed that Temple had passed two insufficient checks at the hotel, and the hotel *issued* a statement for a warrant and that thereafter the company got a check. A receipt from the Edgewater Beach Hotel was admitted following a statement of Mr. Temple's attorney: "I don't think we have any objection" (R. 513.) Wouldn't a competent attorney object to the testimony of Bruce Henderson that Mr. Temple gave them a check for $95.70, U. S. Exhibit 93, on which the letters "N.S.F." appeared in red ink. Instead of strenuously objecting to the admission of this Exhibit, Temple's counsel "No objection" (R. 516.)

The same condition existed with reference to an insufficient fund check given the Northwest Airlines and a letter from a bank to the airline company that the bank charged its account with a non-sufficient check of Paul Temple in the sum of $33.94. Mr. Temple's attorney said he had no objection to their admission (Rec. 487.)

Petitioner has pointed out in detail numerous instances where his Counsel affirmatively stated that he had no objection to the introduction of what is obviously highly prejudicial evidence. (See pages 23-30 of his Petition.) One must conclude after reading these pages that such conduct on the part of Petitioner's attorney deprived him of a trial in a real sense and together with other matters called to this Court's attention, made a farce of the trial.

Certainly the incidents recited in the Petition indicated a high degree of incompetence of defendant's attorney, or a degree of negligence that amounted to the same thing.

Although Petitioner's counsel asked the Trial Court for time in which to file a motion to dismiss the indictment, he apparently did not understand the plain language of the Court that if Counsel had any motion which he wanted to present, the Court would be glad to consider and pass on it (Rec. 51-51a.) He filed no motion to dismiss.

At the conclusion of the Court's charge to the Jury Defense Counsel stated that he had no exceptions to the language of the charge given but asked the Court to instruct the Jury on two additional points (Rec. 1017.)

Petitioner's Counsel filed no motion for a new trial nor any motion in arrest of judgment. If Counsel believed that the Court should have given the additional instructions requested (Rec. 1017) and which were not given by the Court, he should have filed a motion for a new trial complaining of this possible error.

So, we have a trial in which the defendant's counsel filed no motion to dismiss the indictment, failed to object to highly prejudicial testimony, and documents, but on the other hand stated he had no objection to their admission, failed to file a motion for a new trial, and a motion in arrest of objection, and failed to except to the Court's instructions to the Jury. A lawyer whose conduct of a trial in the foregoing manner stamps himself as incompetent or so negligent as to equal incompetence.

Certainly it is silly to excuse this conduct with the observation that many attorneys consider it sound strategy not to object to all inadmissible evidence but only to what appears extremely damaging and prejudicial. What could

be more damaging and prejudicial than the testimony and documents to whose admission defendant's counsel stated he had no objection?

Did Petitioner's attorney understand the impact or consequences of affirmatively letting the evidence in?

a. At Paragraph 9 of the Government's Brief, they argued that the allegation in the indictment charging the defendants with aiding and abetting each other was unnecessary, since they were charged with committing the crime itself. In arguing that the allegation was unnecessary, Government Counsel did not say that it is surplusage. The allegation may have been unnecessary; however, it was made and should have been proven. Furthermore, as pointed out in the Petition (page 22) one cannot be an aider and abettor of himself in the commission of an offense. Defendants Bishop and Woodall were acquitted, so that the effect of such acquittal definitely changed the charge in the indictment to one that the Petitioner aided and abetted himself.

b. Government counsel state that the Petitioner complains that his counsel failed to object to the introduction in evidence of a few checks drawn on the Thrift Corporation account which were used to make good certain of Petitioner's insufficient fund checks and other debts for personal items (Gov't Brf. 9.) Petitioner's complaint was more serious. Petitioner's counsel affirmatively stated that *he had no objection* to the admission in evidence of the foregoing items.

The indictment did not charge the disbursement of these funds to make good checks and to pay Petitioner's debts. The indictment charged (Rec. 8):

> "It was a further part of said scheme that on or *after* January 18, 1960, the defendants would or did withdraw from the account of Thrift Corporation of

America approximately $123,745.00 of the funds previously obtained from the account of Georgia Casualty and Surety Company and disbursed said monies into various bank accounts of and under control of the defendants in and about Chicago, Illinois."

The disbursal of the said funds by the Thrift Corporation into bank accounts under the control of the defendants was as far as the Government could go to prove what its attorneys call "intent." There is no charge in the indictment that the aforesaid sum of $123,745.00 should have been used to effect the proposed merger of the Georgia Casualty with Eagle Fire Insurance Company. There were two deals with respect to the acquisition of the Eagle Fire Insurance Company. The first one was a merger by exchange of stock, the second one involved a contract by which the Georgia Casualty Company agreed to purchase the control stock of the Eagle Fire Insurance Company from its directors and other shareholders. In neither case was the foregoing sum to be used.

Government attorneys argue that the closing argument of the Assistant District Attorney on the question of the insufficient fund checks (Rec. 994-995) was an attempt to refute the argument of Petitioner's counsel (Rec. 967-968.) Petitioner's counsel didn't refer to the purchase of any clothing by Petitioner, but the Assistant District Attorney said to the Jury, "A man who went out and purchased thirty-five hundred dollars worth of clothes at one time, and two hundred and sixty-eight dollar suits, but he hadn't paid for those, but, boy, when he got this Georgia Casualty money he sure did start paying off this little insufficient fund checks." It probably occurred to the Assistant District Attorney that there wasn't a juror in the case who ever bought a two hundred sixty-eight dollar suit, or purchased $3,500.00 of clothes at one time.

Defendants, Eva Woodall and Roy E. Bishop, were acquitted. They were as deeply involved in the scheme charged as was the Petitioner, Paul Temple. No testimony or evidence was introduced against them that either of them issued insufficient fund checks nor bought thirty five hundred dollars worth of expensive clothes at one time. Such testimony and evidence, however, was introduced against the petitioner with the apparent approval of his attorney; certainly it can be logically argued that the introduction of this highly prejudicial evidence against Mr. Temple turned the scales against him.

2. Government counsel has overlooked the observation of the Court of Appeals appearing in its opinion: "The promise of merger, although premised largely on hope, was not completely without substance" (see App. 2 of Petition.)

The indictment does not charge that the acquisition of the Eagle Fire Insurance Company, whether by merger or by purchase, was a part of the scheme to defraud. In brief, the indictment charged a scheme to purchase the stock of the Georgia Casualty from its directors and officers with the assets of the company obtained through fraud and misrepresentation and to obtain money from the Georgia Casualty after the defendants had obtained control of the company and had elected themselves as officers. The alleged merger was, therefore, not a part of the scheme to defraud as argued by Government Counsel. Government Counsel concede that the Georgia State Law required mailing of proxy notices to effect the merger of corporations, but that there was no valid merger. As a matter of fact, there was no merger at all because the defendants were arrested before any merger or purchase of the Eagle Fire Insurance stock could be effected. *Parr v. United States*, 363 US 373, 389-391 applies to the situation under discussion with mathematical precision.

3. In any criminal case cross-examination of Government witnesses is the most vital part of a defendant's trial. There should be no limitation of cross-examination. The trial Court permitted the attorneys to ask such *special* questions as might relate to their clients and it gave the defense attorneys full opportunity to cross-examine with respect to any *material* matter. This direction obviously cripples an attorney in his cross-examination. The Trial Court's statement that he didn't want the cross-examination repeated could have been obviated by objections from Government Counsel whenever a question was repeated. Competent counsel given a free rein in cross-examination might have discovered and developed facts favorable to the Petitioner which could have had an effect on the eventual outcome of the case. The limitation which the Trial Court placed on Counsel might not have had an adverse effect if Petitioner's counsel had been thoroughly competent and able to move the cross-examination into narrow fields of inquiry without violating the judge's general prescription. Government Counsel state that there is nothing in the record to show that Petitioner's counsel was improperly refused a request for cross-examination or was restricted in the cross-examination undertaken. The Court's direction respecting cross-examination was a sufficient restriction upon Petitioner's counsel.

4a. The Government attorneys in answering Petitioner's complaint of the instruction to the Jury (Rec. 1011-1012) state that the two preceding paragraphs of the charge and the three following paragraphs (Rec. 1012-1013) cure the error in the instruction complained of at pages 39-41 of the Petition. A reading of these paragraphs indicates that the error is not neutralized but is compounded, since they refer to two or more *persons* and to a *common* plan or arrangement and not to the defendants or to the scheme or plan charged in the indictment.

Petitioner's counsel will attempt to revise the instruction, and make it a proper one (in his opinion), and this revised instruction will emphatically point out the errors in the instruction complained of by Appellant:

> "In order to establish proof that each defendant was a party to, or a member of, the scheme described in the indictment, the evidence must show that the plan was formed and that each defendant who is claimed to have been a member of the scheme, knowingly participated in this scheme, with the attempt to advance or further some object or purpose of the scheme.
>
> In determining whether or not a defendant was a party to, or a member of, the scheme described in the indictment, the jury is not to consider what others may have said or done; that is to say, the membership of a defendant in the scheme described in the indictment, must be established by evidence as to his own conduct, what he himself said or did.
>
> If and when it appears from the evidence that the scheme described in the indictment did exist, and the defendants were parties or members thereto, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any defendant, may be considered by the jury as evidence in the case as to the other defendants, even though the acts or statements may have occurred in the absence and without the knowledge of the defendants, provided such acts and statements were knowingly made during the continuance of such scheme, and in furtherance of the object or purpose of the scheme."

CONCLUSION.

For the reasons stated in this Reply Brief and in the Petition for Certiorari it is submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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